Unpublished Order
Not To Be Cited
Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED DECEMBER 7, 1981
January 15, 1982

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 81-1674 *vs.*

VINCENT ZUCKERMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 Cr 208

Marvin E. Aspen,
Judge.

ORDER

Defendant Zuckerman appeals his conviction for violation of the federal mail fraud statute, 18 U.S.C. § 1341 (1980). Zuckerman argues that (1) the government failed to establish beyond a reasonable doubt the existence of any fraudulent scheme; (2) the mailings alleged in the indictment were insufficiently related to any "scheme" and therefore do not fall within the prohibitions of the federal mail fraud statute; (3) the jury was instructed erroneously on the requisite relationship between the mailings and the scheme; and (4) the trial court abused its discretion in allowing highly prejudicial testimony concerning Zuckerman. Because we find that the evidence was sufficient to support the jury's verdict and that no error was committed by the district court, we affirm the conviction.

I

Zuckerman was indicted for five counts of mail fraud arising out of his business dealings as a hospital supply salesman. From June, 1977, to October, 1978, Zuckerman operated a hospital supply business from three different addresses under the names Good Samaritan Hospital Supply Corporation, Pahsco Co., Physicians Supply Company, Physicians Supply Division, Doctors Supply Corporation, and Surgical Supply Corporation. During the same period, Zuckerman used the aliases James Breen, George Weiss, and James Murphy in his business dealings. The indictment alleged that Zuckerman, representing himself to be George Weiss, of Good Samaritan Hospital Supply Corporation, ordered television sets and videotape recorders from Zenith Distributing Company with no intention of paying Zenith for the merchandise. Zuckerman allegedly placed, and paid for, an initial order of two television sets. Zuckerman then made six substantial orders in less than a month for a toal of over $24,000 in Zenith products. The indictment charged that Zuckerman intended to sell these products before the bills from Zenith came due, and never pay Zenith for the products. The five counts of the indictment were based on five separate invoices sent to Zuckerman on orders he placed between September 29, 1978 and October 24, 1978.

At trial, the government introduced evidence of Zuckerman's business dealings which demonstrated a pattern of conduct which even Zuckerman concedes was "unorthodox." In June, 1977, Zuckerman leased a storefront in the name of Good Samaritan Hospital Supply Corporation at 9006 Waukegan Road, Morton Grove, Illinois. Two months later, in August, 1977, Zuckerman, posing as "James Breen," leased a second storefront at 2343 West Irving Park Road in Chicago. The store was rented on behalf of Pahsco Company to sell medical supplies, and "Breen" claimed to be the vice-president of Pahsco. A few weeks later the lease was reexecuted at the

request of "Breen" in the name of Physicians Supply Company. Signs designating the business as "Physicians Supply Division" and "Doctors Supply Corporation" were hung at the Irving Park store.

In August Zuckerman applied for a post office box for mail delivered to Good Samaritan Hospital Supply at the Waukegan Road address. He subsequently filed a change of address form for the box, listing the Irving Park store as the business' new address. In late August, Zuckerman opened a bank account for Good Samaritan Hospital Supply, listing himself and two other names, Meyer Kaplan, M.D. and Patrick Fitzgerald, on the signature card. The addresses listed for Kaplan and Fitzgerald were fictitious.

In September, 1978, Zuckerman rented a third storefront at 6143 Touhy in Chicago. Zuckerman signed the lease as "James Murphy," president of Surgical Supply Corporation. Zuckerman also closed the Waukegan Road storefront in September, moving the remaining equipment to the Touhy address.

Zuckerman's dealings with Zenith began in late August of 1978, shortly before he abandoned the Waukegan Road storefront. Under the name "George Weiss," Zuckerman contacted Zenith on behalf of Good Samaritan Hospital Supply to request price sheets and information on how "Weiss" could become a Zenith dealer. Normally Zenith would have required a financial statement, a credit reference, and a bank reference before opening a new account. Zenith did not require this information, however, because Zenith's credit manager mistakenly assumed the corporation was somehow affiliated with Good Samaritan Hospital. "George Weiss" placed his first order from Zenith on August 30, 1978, for two seventeen-inch color televisions. The order was shipped to Good Samaritan Hospital Supply at the Waukegan Road address. Zenith mailed the billing invoice on September 5, 1978. Under Zenith's billing procedure, payment for anything billed and shipped through the 25th of the month was due approximately the 10th of the

following month. In practice, according to Zenith's credit manager, bills fell due about thirty days after merchandise was shipped. Thus, the August 30 order from Good Samaritan Hospital Supply was due to be paid on October 10. Zenith received full payment for the order sometime between October 10 and 12. The check was drawn on the corporate account of Good Samaritan Hospital Supply and was signed by "Meyer Kaplan."

Beginning September 29, 1978, "George Weiss" made six additional orders from Zenith in less than a month. Orders were placed on September 29, October 2, October 13, October 18, October 23 and October 24. The first two orders were billed and shipped to the Waukegan Road address. The remaining four orders were billed to the vacant Waukegan Road address and shipped to the Irving Park address. Five invoices were sent for these orders, with the fifth invoice reflecting the combined orders of October 23 and October 24. The merchandise was primarily color television sets and videotape recorders, with a total value of $24,012.17.

Zenith became suspicious at the end of October concerning the orders from Good Samaritan Hospital Supply. "George Weiss" had called Zenith on October 24 to inquire whether any special Christmas prices would be available on videocassette recorders. "Weiss" had been very reluctant to leave a phone number where he could be reached to answer his inquiry. When a Zenith employee tried to return the call to the number "Weiss" had given, there was no answer. The phone number "Weiss" had given to Zenith was registered to Zuckerman.

Zenith's in-house investigators were notified of the October 24 incident by the assistant credit manager. The same day, an investigator called the phone number "Weiss" had left but was unable to reach "Weiss." The investigator then drove to the Waukegan Road address and noted that the store was vacant and no signs were posted. The investigator also drove past the Irving Park address and saw two signs posted, "Physicians

Supply Division" and "Doctors Supply Division." Displayed in the window of the Irving Park store were hospital and medical supplies. On October 26, 1978, two investigators conducted a surveillance of the Irving Park Road address during the delivery of the most recent Zenith order to Good Samaritan Hospital Supply. They then walked past the store and noted that a temporary cardboard sign, "Good Samaritan Hospital Supply Corporation," had been taped to the door. The Zenith investigators also met with two Chicago police officers, who told the investigators that Zuckerman was a "con man" and that they "better get in there before that stuff disappears out the back door." The Zenith investigators then entered the store and repossessed the merchandise they had watched being delivered.

Zuckerman made no further payments to Zenith on any of the orders, leaving a final balance due, after deducting the value of the repossessed merchandise, of $22,567.00. Zuckerman subsequently sold some of the Zenith merchandise at below cost. In late 1978, Dr. Henry Dold and his associate purchased two videocassette recorders from Zuckerman's Surgical Supply Company office on Touhy. Zuckerman sent the two doctors invoices which showed that the doctors were buying syringes. Dr. Dold and his associate returned the invoices and requested proper invoices showing the sale of videocassette recorders. Zuckerman subsequently provided corrected invoices. From March through May of 1979, Zuckerman traded television sets to Victor Klubeck, another medical supply dealer, in exchange for allergy syringes. In each case, the prices charged by Zuckerman for the television sets were below his cost.

Zuckerman was indicted on April 2, 1980. At trial, Zuckerman presented certain exhibits, but no testimony. On January 22, 1981, the jury found Zuckerman guilty on all five counts. On April 14, 1981, Zuckerman was sentenced to one year of imprisonment on Count One, four years probation on

Counts Four and Five, and fined one thousand dollars for each of the five counts. In addition, Zuckerman was ordered to pay full restitution to Zenith in the amount of $22,567.00. Appeal was timely filed on April 23, 1981.

II

A

Zuckerman argues that his conviction cannot be upheld because the government failed to show that he devised a "scheme" to defraud. All the government established, according to Zuckerman, was that he engaged in "unorthodox" business practices and failed to pay for merchandise ordered from Zenith. Without any evidence of a "scheme," an essential element of mail fraud was absent from the government's proof.[1]

" 'The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.' " *United States v. Stanford*, 589 F.2d 285, 296 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979) (quoting *Weiss v. United*

[1] 18 U.S.C. § 1341 (1980) states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

States, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941)). Viewing the evidence presented at trial in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), *United States v. Beck*, 615 F.2d 441, 447-48 (7th Cir. 1980), we find that the jury could properly infer that Zuckerman devised a scheme to defraud Zenith.

The pattern of Zuckerman's dealings with Zenith indicated that his payment of a small initial purchase was devised to lull Zenith into thinking he was a legitimate new customer, and thereby ensure that Zenith would fill his large subsequent orders. *Cf. United States v. Clark*, 649 F.2d 534, 541 (7th Cir. 1981) (payment of stock dividend lulled buyer of fraudulent stock into believing stock was legitimate). The corporate bank account used to pay Zuckerman's initial order from Zenith listed two apparently fictitious authorized signers. One of those fictitious signers, "Meyer Kaplan," purportedly signed the check sent in payment of Zuckerman's first order from Zenith. This in conjunction with Zuckerman's use of various corporate names, multiple addresses, and several aliases, could be used to conceal Zuckerman's true identity and make it difficult for Zenith to locate him. It also was undisputed that Zuckerman never paid for any Zenith merchandise after the initial order, and sold at below cost some of the Zenith merchandise he had obtained. From all of this evidence the jury could reasonably infer that a scheme to defraud existed. *See United States v. Gordon*, 580 F.2d 827, 834 (5th Cir. 1978), *cert. denied*, 439 U.S. 1051 (1979).

B

Zuckerman next argues that, even if a "scheme" existed, the mailings in this case were insufficiently related to the scheme to bring this case under the mail fraud statute. The mailings upon which jurisdiction rests in this case were the invoices sent by Zenith to Zuckerman after orders were placed in the name of Good Samaritan Hospital Supply. Zuckerman states that his "scheme" to defraud Zenith was complete after the Zenith merchandise was delivered to him. The mailings

were not necessary to acquire the goods. To the contrary, the mailing of the invoices would be against Zuckerman's interests because the mailings would trigger the time period for payment. Thus, Zuckerman argues, it would be in his interest for the mailings never to occur.

The mailings necessary to implicate the federal mail fraud statute are "caused" when a defendant " 'does not act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.' " *United States v. Maze*, 414 U.S. 395, 399 (1974) (quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)). It is not necessary, then, that the defendant make the mailings, but only that the mailings be necessary to the completion of the fraudulent scheme and that the defendant reasonably foresee that the mailings would occur. *United States v. Galloway*, No. 81-1693, slip op. at 4-6 (7th Cir. Nov. 17, 1981); *United States v. Ledesma*, 632 F.2d 670, 676 (7th Cir.), *cert. denied*, 449 U.S. 998 (1980).

The mailings in this case were initiated by the defendant and were necessary to the successful outcome of his scheme. The mailings were the primary feature of the billing system which Zuckerman sought to take advantage of in order to succeed in his plan to defraud Zenith. Zenith's regular billing practice was to mail invoices at the same time or shortly after an order was shipped. Upon request by the customer, the order could be sent C.O.D. Zuckerman's order triggered the mailings, since he made no request for C.O.D. payment. Zuckerman knew that a mailed invoice would not be due for at least thirty days, and if the order was properly timed, not until forty-five days after the order was placed. The mailings therefore created the time frame for the fraud.

Thus, contrary to Zuckerman's argument, this case is not governed by *United States v. Maze*, 414 U.S. 395 (1974). There the Court held that the fruits of fraudulent use of a credit card had been received and the scheme completed before the

mailing of the credit slips to the bank for payment. The Court found the mailings to be only a result of the fraud, not a part of the scheme to defraud, and noted that the mailings in fact were contrary to the defendant's interests, since they would aid in detecting the fraud. *Id.* at 403-405. Here, the mailings implemented the billing policy that made Zuckerman's scheme possible. In effect, the mailings were similar to cases where the mailings are used to lull the victim into thinking that conduct which in fact is fraudulent is actually legitimate. *See, e.g., United States v. Heitzinger,* No. 80-2324, slip op. at 4 (7th Cir. Sept. 10, 1981); *United States v. Clark,* 649 F.2d 534, 541 (7th Cir. 1981). The mailings were necessary to provide the time to complete the scheme, that is, for Zuckerman to sell the Zenith merchandise and pocket the proceeds. The mailings therefore were sufficiently connected to the fraudulent scheme to be within the purview of the mail fraud statute.

Zuckerman also raises a related issue concerning the mailings, asserting that the district court incorrectly instructed the jury that use of the mails need not be contemplated by the defendant under the mail fraud statute.[2] In order to determine whether there is error in any particular instruction, we look to all the instructions given to determine if they fairly and

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[2] The instruction given by the court read as follows:

> The use of the United States mails in furtherance of a scheme to defraud is an essential element of the crime of mail fraud. It is not necessary that the use of the mails be contemplated by the scheme, or that defendant does any actual mailing, or intends that the mails be used. It is sufficient to establish this element of the crime if the mails were in fact used to carry out the scheme, and that the use of the mails was reasonably foreseeable.
>
> The mailed matter need not disclose on its face a fraudulent representation or purpose, or request for money, but need only be intended to assist in carrying out the scheme to defraud.

Tr. 286-87. The defendant objected to the second sentence of the first paragraph.

adequately represent the issues to be resolved by the jury. *United States v. Patrick*, 542 F.2d 381, 389 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *United States v. Rajewski*, 526 F.2d 149, 159 (7th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976). As our discussion on the elements of mail fraud indicates, the instruction given, standing alone, is not erroneous. Certainly viewed in light of all of the instructions, we find no prejudicial error.

D

The final issue raised by Zuckerman is whether the district court erred in admitting testimony that Zuckerman alleges was highly prejudicial. The disputed testimony concerns a conversation between Zenith investigator Cello and two Chicago policemen when the Zenith investigators were conducting the surveillance of Good Samaritan Hospital Supply on Irving Park Road. The Chicago policemen told Cello that Zuckerman was a "con man" and urged the investigators to get the Zenith merchandise "before it disappears out of the back door." Tr. 86.

Zuckerman made a motion in limine concerning this testimony. The government responded that while they would elicit testimony on the meeting between the police officers and the investigators, the conversation would not be testified to. Tr. 6-7. At trial, investigator Cello testified on direct examination concerning the investigation and surveillance of Zuckerman's business that culminated in the repossession from the Irving Park store of the last Zenith delivery on October 26, 1978. Cello mentioned the meeting with the police officers and stated that a conversation took place. Tr. 79. On cross-examination, Zuckerman's attorney focused his questions on the October 26 surveillance, particularly on what Cello had observed that would have justified the repossession of Zenith merchandise. The government then requested permission to ask Cello about the conversation with the police officers, to rebut the inference

raised on cross-examination that the motivation for repossession was inadequate, improper and illegal. The court granted permission on the basis that "both of you have opened the door." Tr. 85. The government then proceeded to elicit testimony about the conversation on redirect.

Under Rule 404 of the Federal Rules of Evidence, evidence of prior bad acts is admissible only if it is offered other than "to prove the character of a person in order to show that he acted in conformity therewith." FED.R.EVID. 404(b). Thus, such evidence could be admitted to rebut an inference of improper motivation raised on cross to impeach the credibility of a witness. *See generally United States v. Lea*, 618 F.2d 426, 431 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980); *United States v. McPartlin*, 595 F.2d 1321, 1343 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). Admissibility is still subject, however, to Rule 403, which requires balancing the probative value of such evidence against its potential prejudice to the defendant. We accord substantial deference to the balancing and ultimate evidentiary decision of the trial judge. *United States v. Watson*, 623 F.2d 1198, 1203 (7th Cir. 1980).

The conversation in this case clearly was prejudicial to Zuckerman. At the same time, Zuckerman's counsel had indeed "opened the door" by focusing on the motivation for investigator Cello's decision to repossess the Zenith merchandise. The statements by the police officers provided a partial explanation for Cello's conduct. While it may have been possible for the government to rehabilitate Cello without eliciting the substance of that conversation, we do not find that it was reversible error to permit that testimony.

III

For all the foregoing reasons, we AFFIRM the judgment of the district court.

FAIRCHILD, *Senior Circuit Judge*, dissenting. In my view the defendant's fraudulent exploitation of Zenith's extension of credit neither depended upon nor was furthered by the

mailing of the invoices. The mailing of invoices was an ordinary feature of Zenith's sales on credit, and certainly resulted from his activity. But that particular feature provided no advantage to the defendant. The mailings did not grant, or induce the victim to grant, the defendant credit. They did not extend the due date, delay discovery, or render the extension of credit more exposed to fraudulent exploitation. At most they triggered the count down toward the expiration of the credit period.

The mailings here did no more to execute the scheme than did the mailings held in insufficient predicate in *United States v. Maze*, 414 U.S. 395 (1974). Therefore we should reach the same result.

The defendant's payment for the first order was doubtless intended to lull Zenith and thus further the scheme, but none of the counts charged any mailing attributable to that order.

I would reverse the conviction.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 26, 1982

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 81-1674 *vs.* VINCENT ZUCKERMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 Cr 208 Marvin E. Aspen, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.